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In the Face of Legal Crises:
How Marketers Creatively Respond to Legal Challenges

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In the Face of Legal Crises:
How Marketers Creatively Respond to Legal Challenges

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Dedication

I would like to dedicate this report to my nephews, Ishaan and Aaryan, who are my inspiration for creativity

Abstract

In the Face of Legal Crises:
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This paper seeks to chronicle the different ways marketers have successfully defended and/or defeated legal challenges that seek to stump their creativity. Previous research, existing laws and regulating agencies are surveyed to define the current lay of the land. Ten unique cases are analyzed to discover over ten alternate responses that brand ambassadors have either successfully or unsuccessfully provided in the face of legal crisis. The findings are summarized, and further research avenues are suggested with the aspiration that up-and-coming brands gain insights from lessons learned in the past.

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Chapter 1: Introduction

When marketers indulge in creative business, they consider the financial implications of their decisions (how much return on investment will I get from this strategy, or that execution?), they anticipate the reaction from immediate stakeholders (what will my investors and customers think about my plan), and they oftentimes give their tactics a creative kick so that it makes a unique, and sometimes bold, statement. However, time and again, the influence from remote stakeholders[1] alters the marketers' original plan. For instance, when there is an unhappy competitor, he will make a move to level the playing field; when there is a dissatisfied interest group, it will voice opinions to hurt the messaging and the reputation of the marketer's brand; and when there is a negatively affected plaintiff, there will be a lawsuit.

There are laws that allow marketers the freedom to speak about their brands and there are laws that protect consumers. In a perfect world, there is harmony between the two sides of a message, the sender and the receiver. But we are currently so far away from that state of perfection; for now, marketers continue to push the limits of their freedoms, and consumers (and interest groups) seek greater and greater protection from invasive and offensive marketing tactics. This tussle leads to legal action, or at a minimum, a controversy that ignites the souls of the interest groups.

Take Benetton for instance. Benetton made countless headlines with its controversial advertising in the 80's and 90's. Most of the advertisements of the "United Colors of Benetton" campaign were created by Italian photographer, Oliviero Toscani. Some of the images that appeared on billboards in major markets include: a bloody

[1] Those other than the investors and the customers.

picture of a new born baby girl still attached to the umbilical cord, a priest and a nun kissing, a white girl with angelic curls standing next to a black boy with hair shaped into devil-like horns, a white baby nursing at a black breast, and so on and so forth. Oliviero made the following comment about his motivation to bring forward a range of social issues in this manner:

> *I have found out that advertising is the richest and the most powerful medium existing today, so I feel responsible to do more than to say, 'Our sweater is pretty'* (Elliott 1991).

Inspired by this and other controversial stories of brands, this report seeks to investigate both successful and unsuccessful cases that exemplify the various ways marketers seek to overcome legal challenges that threaten to stifle their creative messaging and other tactics. Sometimes, they are indeed successful and even generate greater business as a result of their responses; other times, they fail to respond successfully to legal challenges, suffer financial loss, and eventually, loss of business altogether. This loss may simply be due to legal fines, in-court losses, or a loss of customer goodwill.

The purpose of this paper is to discover unique tactics that marketers use to respond to legal challenges. The resulting findings will ultimately help the up-and-coming brands and brand ambassadors to equip their toolbox, to align their strategies, and to rev up their defenses, in case the legal front turns into a battlefield.

Chapter 2: Background

This chapter seeks to outline the research that makes up the body of knowledge in the area of creative responses to legal challenges. It begins by expanding the definition of the term 'marketing' to include the element of 'society' within its embrace; the effect of marketing on society and of society on marketing is cyclical. Next, this chapter summarizes the laws that affect marketers, and the role of the regulating agencies that can cause marketers to twitch. Finally, the chapter closes with a register of common mistakes that marketers make when voicing their creative sales pitches[2].

Several scholars, columnists, businessmen and observers have written about marketing, its scope, and its limitations. However, there is hardly any research on the perspective of creative responses to legal challenges. Nonetheless, a brief survey of what has been said so far leading up to the question under investigation in this paper, i.e. "when faced with legal challenges, how do marketers respond with creativity", is highlighted below.

MARKETING DEFINED

Usually, marketing is defined in two-dimensional terms: the first relating to the company's profitability, and the second relating to customer satisfaction (which in turn leads to the company's profitability). For instance, Kotler et al. (2008) describe marketing as a process whereby companies seek to create value for their customers and for themselves. The Charted Institute of Marketing[3] defines marketing as "the

[2] Arguably, in the form of advertising.

[3] A professional marketing body based in the United Kingdom, having worldwide membership, and with the objective of raising the status of marketing worldwide: http://www.cim.co.uk/about/home.aspx

management process responsible for anticipating and satisfying customer requirements profitably." Another definition brings together a collaboration of building customer relationships and creating competitive advantage in order to maximize the returns for the shareholders (Paliwoda and Ryans 2008).

Few definitions bring forth the three-dimensional aspects of marketing, one that includes the larger community in addition to the firm's profitability and its customers. The American Marketing Association (AMA)[4] is one of those few whose definition embraces this third dimension of stakeholders: it defines marketing as "the activity, set of institutions, and processes for creating, communicating, delivering, and exchanging offerings that have value for customers, clients, partners, and society at large." This society is a legally and ethically charged society, which will hold the marketer accountable for actions that would otherwise go unchallenged if only the company and its customers were involved.

WORD ON THE STREET: MARKETING AND SOCIETY

The promotional aspects of marketing, such as advertising, are often criticized and usually come under scrutiny (Cherian et al. 2007). People expect businesses, and business personnel, to apply ethical standards; they expect them to know and consider right from wrong; they want them to determine what is fair and what is not when making business decisions. And when that fails, people are quick to call out a wrong move made by a business. And when too many people complain, the government steps in to curb the negative influences of marketing upon society. In essence, society is a catalyst for the

[4] An association for marketers, with both professional and collegiate chapters across the United States. It has an academic division, and publishes a number of industry journals: http://www.marketingpower.com/_layouts/Dictionary.aspx

regulation of businesses' marketing activities. The impact of society on marketing, and of marketing on society, is best exemplified by Figure 1 below.

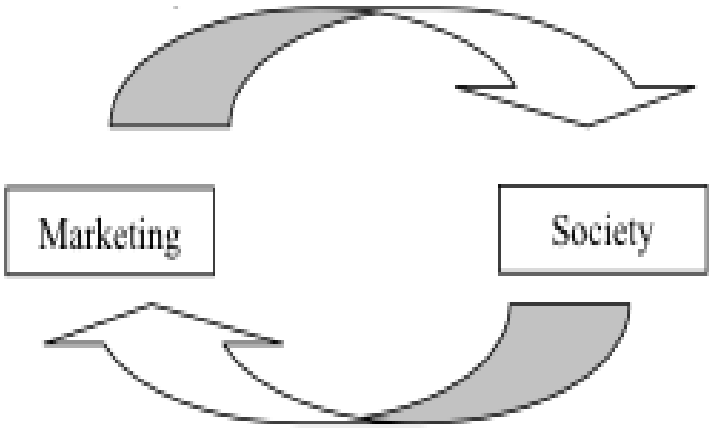

Illustration 1: Impact of Product/Service Source: Wadekar 2007

The process is cyclical, beginning from the point at which the product is introduced into the market, and continuing on till the product remains in the market. In fact, some would argue that these effects continue in the market well after the product leaves the market; for instance, when a product releases pollutants while still in the market, or when it causes other environmental harm that is not easily removed by simply picking up remaining items off a shelf.

Armed with this knowledge, and as a result of the increasing impact of globalization, where better goods and services are demanded beyond national frontiers, marketers have to be prepared to cater to different markets, different cultures, and different societies (Wadekar 2007).

MARKETING, AND THE LAW

The area of creative responses to legal challenges in the marketing realm is an area that needs much investigation. The closest study done in this area is a Helsinki

University of Technology, Finland, dissertation that discusses the important legal challenges in the future of the information businesses[5], concluding that those challenges exist in the areas of privacy and data protection, intellectual property rights, and contracts. More importantly, the study highlights the fact that the law can affect businesses in many ways, sometimes enabling them, and sometimes hurting them (Olli 2006).

LAYING DOWN THE LAW: CURRENT LAY OF THE LAND

Marketers do not operate in a vacuum. There are a number of rules and regulations that guide a marketer's activities and record their trails. Not all these regulations are "all bark no bite"; indeed some are enforced by regulating agencies. Outlined below is a summary of some of the most important laws and some of the prominent regulating agencies.

Laws and Regulations

Free speech is guaranteed and protected; but there are limitations, and there are rules that ensure that those limitations do not pass under the radar.

First Amendment

In the United States, the freedom of speech can be traced back to the Constitution, the source of power for all creative endeavors of marketers. The First Amendment states in part:

> *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances* (U.S. Const. amend. 1).

[5] Entities that engage in production, editing, filtering, publishing, retail, promoting and delivering content, including software companies and businesses that specialize in enhancing content with metadata.

There are various forms of speech, and each kind varies in the level of freedom it enjoys. Speech that proposes a commercial transaction between the sender and the receiver is commercial speech (*Central Hudson Gas & Electric Corp. v. Public Service Commission of New York,* 1980**)**. Advertising is a form of commercial speech. Initially, purely commercial speech was not protected under the First Amendment (*Valentine v. Christenson*, 1942). However, over time, this protection was indeed extended to commercial speech (*Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 1976; landmark case that held for the first time that even purely commercial speech is entitled to First Amendment protections).

These freedoms flowing from the Constitution are extended to the states via the application of the 14th Amendment. (*Gitlow v. New York*, 1925). As a result, all states enjoy the notion of a free marketplace, an idea supported by Justice Oliver Wendell Holmes in his oft-quoted dissent:

> *…the ultimate good desired is better reached by free trade in ideas… the best test of trust is the power of the thought to get itself accepted in the competition of the market…* (*Abrams v. United States*, 1919).

This freedom to color the marketplace, however, is not absolute, and although it is protected, it does not enjoy as much protection as political speech (*Central Hudson Gas & Electric Corp. v. Public Service Commission of N. Y.,* 1980**)**. The government usually carries the burden to prove that speech is illegal (*United States v. Carolene Products Co*., 1938). Political speech comes under the highest degree of scrutiny, and the government must have a compelling interest to regulate political speech. On the other hand, courts look at the government's regulation of commercial speech with intermediate scrutiny, which is a lower level of scrutiny and dictates that restrictions on the time, place, and manner of speech may be imposed if those restrictions are reasonable. Courts have

delineated a four-tier test for the regulation of commercial speech: first, determine whether the commercial speech relates to a lawful activity and is not misleading; second, determine if the government interest is substantial (there is not legislative presumption in favor of substantiality; *44 Liquormart, Inc. v. Rhode Island*, 1996); third, if substantial interest is shown, determine whether the regulation directly advances the government's interests; and fourth, check to make sure that the regulation is not more extensive than is necessary to serve the asserted interest (*Central Hudson Gas & Electric Corp. v. Public Service Commission of N. Y., 1980*). The fourth factor need not be the least restrictive regulation; rather, it needs to be a reasonable fit between the legislature's ends and the means chosen to accomplish those ends (*Board of Trustees, State Univ. of N. Y. v. Fox*, 1989).

When the restriction is based on the content of the communication, government action must be scrutinized more carefully to ensure that speech has not been prohibited merely because public officials disapprove of the speaker's views" (*Consolidated Edison Co. v. Public Service Commission*, 1980). So, generally speaking, within the parameters of permissible restrictions, the marketplace is accepted as an open canvas to be colored by the unique ideas of the several brand managers as long as their executions are not false or misleading. And marketers use this as their license to meddle into avenues where no one has heretofore wandered.

Recently, the marketing community won a major victory in the U. S. Supreme Court, where the Court struck down a Vermont law that restricted the use of prescriber histories for the purpose of promoting pharmaceutical products to physicians (*Sorrell v. IMS Health*, 2011). This 6-3 decision reversed two Circuit Court decisions that upheld similar laws in Maine and New Hampshire. Executive Vice President of Government

Relations for the Association of National Advertisers (ANA), Dan Jaffe declares this decision a victory for the advertising industry:

> *It raised fundamental issues about what constitutes commercial speech and whether the government can undermine constitutional protection by simply labeling information used for marketing purposes as nothing more than a commodity. We are very pleased that the Supreme Court has made clear that data mining for marketing purposes is fully protected by the First Amendment* (Jaffe 2011).

The ANA was supported in their fight towards this substantial victory by the American Advertising Federation (AAF), the American Association of Advertising Agencies (AAAA), and other interested parties and groups. The ruling in this case is anticipated to help other commercial speech cases pending in the various Courts.

Consumer Protection Laws

In most states, the consumer protection laws protect consumers against false, misleading, and deceptive trade practices. In Texas, that law is the Deceptive Trade Practices Act (DTPA)[6]. Consumer protection laws protect the consumers who either seek or acquire goods or services (either by purchase, or by lease) and that good or service forms the basis of their complaint. A deceptive advertisement would violate these laws because it influences consumers' decision-making when they are seeking or acquiring goods or services.

Employment Laws

Marketing and sales personnel often represent a company in highly visible ways. Attempts to manage the company image through its marketing and sales representatives can become problematic with respect to employment laws. There are laws that address

[6] The DTPA was enacted in 1973. It was originally modeled after the Federal Trade Commission legislation, and has been amended quite a bit since its inception.

both disparate treatment and disparate impact of employment practices. When a company directly discriminates in its hiring practices by recruiting only members of a certain class while rejecting others, it is indulging in a disparate treatment case. However, when a company employs policies that have the effect of excluding members of certain classes, although the policy on its face is not discriminatory, it has committed a case of disparate impact. How a company treats its people (potential and current employees) is arguably another important 'P' to add to the four Ps of marketing[7].

Research has indicated a direct relationship between how a company treats its people, and the company's competitive edge and profit potential (Pfeffer and Veiga 1999). If businesses set physical traits as a basis for employment, they must show a business necessity for those standards (height and weight standards can be a business necessity if they are shown to be job related and are applied in an equal manner between the sexes; *Dothard v. Rowlinson*, 1977). A number of laws set restrictions on the employment policies of companies: the Immigration Reform and Control Act of 1986[8], the Age Discrimination in Employment Act of 1979[9], and the Americans with Disability Act[10] among others. The Civil Rights Act of 1964 makes it unlawful for businesses to discriminate in employment on the basis of race, color, religion, sex, or national origin. There are other rules that regulate the hiring and recruitment process of employers, pregnancy discrimination, family and medical leave, equal pay, occupational safety and workers' compensation, retirement, benefits, and so on and so forth.

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[7] 4 Ps = product, place, price, and promotion.

[8] Employers cannot discriminate on the grounds of national origin, lack of United States citizenship, status as an alien lawfully admitted to the United States, or status as a refugee; applicants who are not fluent in English cannot be discriminated against unless there is a business necessity.

[9] Employers cannot use age as a hiring criterion unless there is a bona fide business purpose.

[10] Discriminating against rehabilitated drug/alcohol abusers of physical requirements would violate this. law; employers are expected to make reasonable accommodation.

Intellectual Property Laws

Most states have enacted laws to protect the confidential, proprietary information of businesses (and individuals) since that too is considered a business asset. As a result, when marketers are creating messages for their brands, they must exercise caution not to steal another's previously protected ideas. If any part of a message is not originally generated by the marketer (or by one working for the marketer who has signed off all rights to content developed within a company's employ to the company), the marketer may risk infringement into another's protected assets. For instance, when a creative director decides to use music without the original artist's permission, or uses another's ideas under his signature, the creative director is stepping into unauthorized territory, and may risk a lawsuit. This is not a rare case; in fact, trademark infringement cases often hit the news and make headlines. Patents, trademarks, and copyrights, all fall under the umbrella of intellectual property.

Privacy Laws

Most Americans consider privacy to be a fundamental right. There are four different causes of action under the common law theory of invasion of privacy: unreasonable intrusion into a person's private affairs (the right to be left alone), misappropriating the name or likeness of another for one's commercial benefit, public disclosure of private facts, and placing a person under false light by unreasonable and highly objectionable publicity. Companies with apparently infinite creative freedom can become stalled by any or many of these laws in an infinite number of ways, ranging from gathering private data about their customers without the customer's knowledge to

defaming[11] an individual in the name of creative advertising to individual pamphleteering[12] that is annoying and inappropriate.

Regulating Agencies

The Constitution grants all legislative powers to the Congress (U.S. Const. art. 1, §1). However, it has been successfully argued that the necessary-and-proper clause has vested in the Congress the ability to make laws that delegate limited lawmaking authority to powerful administrative agencies (U.S. Const. art. 1, §8). These regulating agencies can sometimes place restraints on the marketer's creative freedom. The Federal Trade Commission (FTC), the Federal Communications Commission (FCC), the Equal Employment Opportunity Commission (EEOC) and the Food and Drug Administration (FDA) are among those agencies most active in generating complaints, and as a result, setting the level playing field of marketers straight.

Federal Trade Commission

FTC's goal is to prevent unfair methods of competition in commerce, and in order to effectuate that result, it polices anticompetitive practices. Furthermore, the Commission also administers the consumer protection laws[13]. In 1983, the Wheeler-Lea Act amended part of the FTC Act giving the FTC broad powers to protect consumers from false advertising practices; since then, it has become the primary agency responsible for regulating advertising. The FTC's work is performed by the Bureaus of Consumer

[11] There are different laws regarding defamation and who can seek relief from an alleged defamation. Private individuals enjoy more protection from defamation than do public figures.
[12] Attorneys and other professionals are held to a different standard; an attorney who finds a victim immediately after a devastating accident and encourages him to file suit through him is running afoul a number of rules.
[13] http://www.ftc.gov/ftc/about.shtm

Protection, Competition, and Economics, assisted by the Office of General Counsel and a number of regional offices.

Federal Communications Commission

The FCC[14] was established by the Communications Act of 1934 and it regulates all non-federal government communications, including advertising, by radio, television, wire, satellite and cable. It also regulates international communications over these media, as long that content either originates or terminates within the country.

Equal Employment Opportunity Commission

Title VII of the Civil Rights Act of 1964 established the EEOC to enforce the provisions of the Act[15]. The EEOC provides guidance for employment issues by creating guidelines for employers to follow. Marketing- and sales-people, who are often the face of the company, can become victims to discriminatory practices and seek refuge from the EEOC. Once people file their complaints with the EEOC, it determines reasonable cause and tries to impress conciliation between the parties. If unsuccessful, it issues a right-to-sue letter, and the parties proceed to the Courts where the justice system takes over. These charges become public information, and can tarnish a brand's image.

Federal and Drug Administration

The FDA[16] is an agency of the U.S. Department of Health and Human Services. It promotes public health by regulating and supervising food safety, tobacco products, dietary supplements, prescription and over-the-counter pharmaceutical drugs, among

14 http://www.fcc.gov/what-we-do
15 http://www.eeoc.gov/facts/howtofil.html
16 http://www.fda.gov/AboutFDA/default.htm

other things. Marketers of food, drugs and tobacco products have to be mindful of the restrictions that FDA places on advertising these products.

COMMON PITFALLS

Despite the existence of freedoms and regulations, there is no guidance for marketers on where to strike the perfect balance. Having said that, it must also be understood that there are indeed marketers who push the limit. Some get in trouble, while come out alive; still others get swallowed by the some other factions of the market, i.e., the consumers, society, and the hungry competitors. While the array of marketing blunders/troubles is limitless, a few of the more common ones are invasion of privacy, excessive (relatively speaking) sexuality, intellectual property violations, deceptive advertising, and practices that directly violate employment laws that affect the society at large. This paper seeks to cast a net for both successful and unsuccessful cases where marketers find themselves in legal trouble, yet swim off and escape legal scrutiny and actually survive; or where they do not.

Chapter 3: Case Analyses

This chapter will examine ten cases that illustrate the various ways marketers defend their fort when they come under legal attack. Viable defenses below range from outright denial of ownership of the advertising message in question, to acceptance of fault and payment of damages.

Ten marketing giants who found themselves in unique legal circumstances are examined with the intention of extrapolating best practices from their various scenarios. Each of these brands continue to be popular today, which means that they survived the war on their existence by either winning or losing the legal battle that threatened their survival.

1. PHILLIP MORRIS, "THINK. DON'T SMOKE."

Public health advocates, and the government, have kept the tobacco industry on its toes. The first group brings it harsh criticisms, and the latter, a bunch of advertising restrictions and bans. Research has not been in their favor either, often bridging the gap between tobacco and cancer. Specifically, the industry has been attacked for targeting young people: in 2005, the Centers for Disease Control published a study that found that 23% of the high school student population had smoked a cigarette in the past 30 days. About 4,000 of those students had smoked a cigarette each morning, and close to 1,500 were regular smokers; smoking kills close to five million people across the globe each year (Kershner and Loomis 2009). Although these numbers are more recent, the attacks on the tobacco industry have been around for over half a century now. Just a few years ago, Phillip Morris tried (actually, was compelled) to respond. And they did it with advertising, yet not so successfully.

In 1998, following the Tobacco Master Settlement Agreement[17], Phillip Morris launched its "Think. Don't Smoke" campaign directed towards 10-14-year olds in the United States who presumably do not smoke. Advertising the risks of smoking was then the latest move in the legal battle between smoking and the anti-smoking lobbies in the United States ("Tobacco companies tell kids"). The campaign included television commercials where teenagers equate not smoking to being "cool" and tell the younger audience of this ad what to do, that is, not smoke. These ads ran on a number of networks for a number of years, and even during the Super Bowl.

At best, this campaign was viewed as a self-interested attempt at creating brand recognition (Campaign for Tobacco-Free Kids 1999), especially, when compared to the "Truth Campaign" created by the American Legacy Foundation also in 1998. In the Truth ads, a shocking truth about a result of smoking was creatively displayed (such as a number of body bags to quantify the number of deaths caused due to smoking in one year in the US), and a rebellious youth would throw that truth in the face of the big guys in a public place. The Truth Campaign was pronounced successful precisely because it portrayed a teen-rebel against the big tobacco company, rejecting (as teens often do) what they were being told to do, which is, to smoke.

[17] Per the agreement, tobacco companies were required to pay $325 billion over 25 years, restrict their advertising and marketing, and run anti-smoking ads.

Figure 1a: Screenshot from one of the "Think. Don't Smoke." Commercials.

Figure 1b: Screenshot from one of the "Truth Campaign" commercials.

The *American Journal of Public Health* published a study in 2002 comparing the impact of the two aforementioned campaigns head-to-head, revealing that 66% of those exposed to Truth ads were less likely to smoke as a result of viewing those ads, whereas 36% of those exposed to the Phillip Morris ad were more likely to smoke.

Phillip Morris was being pretentious in downplaying their self-interest in a minimally-financed campaign ("When don't smoke means" 2006), and its pretence was quickly uncovered.

2. SISLEY, FROM BENETTON

When hit with controversy, Sisley took a different stand altogether: denial. Here is the controversial ad…

Figure 2: Models snort a dress as if it were cocaine in a purported Sisley Ad.
Source: World Net Daily[18]

Notice the word fashion spelled 'fashioin'; notice the Chase credit card beside the dress with crushed white powder on it. Sisley is a division of Benetton, which itself thrives on controversial advertisements. This ad, as one would expect, generated a flood of negative comments, while giving Sisley the controversy it needed to respectably call itself a division of Benetton. When the damage was done, Benetton came back and denied any connection to this campaign, saying that they were the victims here since their trademark in Sisley had been infringed. Most importantly, they survived an investigation by the Advertising Standards Authority in the United Kingdom, simply by denying any connection to the ad, and allowing it to blow away. No one may ever know who sponsored the ad – maybe it was Sisley, maybe it was not. But Sisley did earn from it.

On a second note, Chase, who said nothing, got some free media as well.

3. CBS, MTV, NFL, JUSTIN TIMBERLAKE & JANET JACKSON

In a memorable halftime show on February 1, 2004, during Super Bowl XXXVIII, singer Justin Timberlake sang "bet I'll have you naked by the end of this

[18] Retrieved from http://www.wnd.com/index.php?fa=PAGE.printable&pageId=42750

song"[19] and proceeded to rip apart Janet Jackson's bustier (and apparently her red lace bra) revealing her nipple for about half a second.

Figure 3: Justin Timberlake after tearing off part of Janet Jackson's clothes during their performance in the Super Bowl XXXVIII halftime show.
Source: Wikipedia [20]

And then the controversy began… activist groups publicly condemned the halftime show and CBS, a number of complaints were filed with the FCC, and the FCC, in turn, levied a record $550,000 fine against CBS. CBS escaped the fine because it proposed the winning argument that Janet and Justin were not employees of CBS; rather they were independent contractors[21] over whose actions CBS had no control, and

[19] The third single from Justin Timberlake's debut album 'Justified'.
[20] Picture retrieved from http://en.wikipedia.org/wiki/Super_Bowl_XXXVIII_halftime_show_controversy
[21] The Court looked at a number of factors, including: CBS did not assign any further work to them besides the one halftime show, they paid them one lump sum amount and no employee benefits; both artists had a substantial skill level indicative of independent contractors; both Justin and Janet hired their own back-up dancers, choreographers, and other assistants giving CBS no control over the activities of the artists, a feature further indicative of independent contractors rather than employees whose actions are directed and controlled by the employer.

therefore, CBS could not be held liable for their actions (*CBS Corp., et al. v. F.C.C.,* 2008). CBS was subjected to ridicule and jokes, but it survived. And so did Janet and Justin.

Janet and Justin are both brands, whose reputation was at risk. But this incident only made them more popular, all for the low cost of a simple apology. Janet apologized ("Jackson's apology can't stem" 2004) saying this incident was an accident – that the red lace bra should have stayed intact – and was not intended to be offensive. Justin also apologized. Show producers CBS, MTV, and NFL all washed their hands of this responsibility. And here is the chain of successes that emerged from this incident: the 'incident' became the most replayed moment in TiVo history; TiVo earned over 35,000 new subscribers from Janet's free marketing; Janet earned a Guinness World Record in 2007 for the most searched person in Internet history; just the following month, Janet's eighth studio album debuted at the number two spot on the Billboard 200, selling over 3,000,000 albums worldwide; in April that same year, Janet appeared as a host on Saturday Night Live, and on the sitcom Will and Grace; in November of that year, she was honored as an African-American role model[22] whose career was saluted; and, just over a year after the incident, she was awarded the humanitarian award[23] for her work in raising money for AIDS charities.

Wow! An apology goes a long way, and certainly leads to a marketing victory. And so does shedding responsibility.

4. ABERCROMBIE & FITCH

In June 2003, Abercrombie & Fitch (A&F) faced a class-action lawsuit by its former African-American, Hispanic and Asian employees who claimed discriminatory

[22] Honored by the 100 Black Men of America, Inc. in November 2004.
[23] Awarded by the Human Rights Campaign and AIDS Project Los Angeles in June 2005.

employment practices (*Gonzalez, et al. v. Abercrombie & Fitch Stores, Inc., et al*.[24]). Many employees were willing to come forward with this type of discriminatory evidence against A&F, yet A&F continued to deny all allegations. However, the evidence against their practices of assigning their minority applicants to behind the scenes job gained momentum, and the public began to see what A&F really meant when they called their brand "All-American".

In 2002, an Asian-American interest group refused to buy A&F clothing after offensive t-shirts such as that displayed in Figure 4a hit the stores.

Figure 4a: Offensive A&F t-shirt that was pulled off the shelves after a boycott. Source: BBC[25]

Only a few years later, in 2005, groups of female interest groups protested against A&F after t-shirts such as the one shown in Figure 4b hit the stores.

[24] The U.S. District Court approved a settlement, rendered a consent decree, valued at approximately $50 million, in April 2005, requiring the company to pay monetary benefits to effected parties.
[25] Retrieved from http://news.bbc.co.uk/2/hi/asia-pacific/1938914.stm

Figure 4b: Offensive A&F t-shirt that was pulled off the shelves after a boycott. Source: Campaign for a Commercial-free Childhood[26].

It does not stop there; they have been under scrutiny for the sexuality displayed in their ads, such as ones where scantily clad men and women are featured in controversial positions. Most of their models are white.

A&F settled the suits, paid costs to plaintiffs, and signed a consent decree dictating that they would implement more multicultural hiring and marketing policies within a specific time frame, while meeting certain benchmarks ("Abercrombie & Fitch case" 2007). They promised to restore public support in their brands. And they did exactly that.

What it took was marketing genius to counter the negative image they had created. They accepted responsibility for their acts, and society tends to be forgiving of people who take responsibility for their actions and serve their sentence (so to speak). A&F also launched a multicultural ad campaign featuring models from races they had previously disenfranchised, wearing A&F clothing, and standing together under the new theme, "Diversity is Who We Are." They followed the rules laid out for them in the consent decree, although there was always the lingering question of whether A&F was

[26] Retrieved from http://www.commercialfreechildhood.org/actions/af.htm

ready for change, or were they only doing what they were forced to do without really having a change of heart.

Either way, it took them out of the negative spotlight; they survived as a business when they could have altogether collapsed and they took proactive steps to fix the wrongs they eventually admitted to. And now that they are out of the spotlight, they apparently are slowly regressing to their old ways. Nonetheless, they continue to operate as a successful apparel company, serving customers in the United States, and around the world.

5. CALVIN KLEIN

Calvin Klein did not listen the first time but should have. Mr. Klein is known to have used child and child-like models in promoting his products. In the 1980s, it was the 15-year-old Brooke Shields; then, Kate Moss; even later, stringy-haired youth who appeared to not have bathed in a very long time. In 1995, Klein allegedly crossed the line between fashion and pornography.

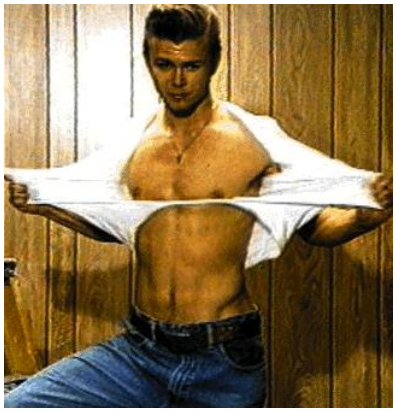

Figure 5: Screenshot of CK commercial. Source: Media Awareness Network[27]

[27] Retrieved from http://www.media-awareness.ca/english/resources/educational/handouts/ethics/calvin_klein_case_study.cfm

The ads showed a young man being encouraged by a voice from behind the camera to rip his shirt off (as pictured in Figure 5 above), or a young girl coaxed by a voice behind the camera to undress. In both versions of the ads, the youth are shown to comply. Klein's defense was that the idea of the ads was to exemplify "inner beauty," which he deems explains the ripping of the shirt, or the undressing; needless to say, child welfare advocates did not agree.

The American Family Association threatened a boycott of stores that carried this brand, major magazines refused to publish ads from this campaign and the Justice Department launched an investigation under the child pornographic laws. The ads were quickly recalled, but not soon enough – they stayed on the market, despite the controversy, long enough for Calvin Klein to profit from the increased coolness factor associated with its edgy advertising. Pulling the ads made the legal issue moot, and Calvin Klein won the day. But one would think he learned his lesson from the close brush with the law.

That was not the case. In 1999, Klein launched a line of kids underwear, and with it launched a campaign that showed images of kids jumping on a sofa in just their underwear. The public responded quickly to these huge billboards on Times Square and other full-page impressions and the ads were pulled within 24 hours. These ads were tagged as being pornographic because they were high-definition, sexualized images of the kids portrayed in the ads. Klein's track record was not in his favor either, despite all his public relations efforts. Testing the consumers' patience is probably not a good idea, and Klein needed to learn from his mistakes the first time around.

6. VERIZON V. AT&T

In late 2009, cell phone service provider Verizon Wireless was running ads that directly compared their 3G[28] coverage to that of competitor cell phone service provider AT&T. Coverage maps of both providers were seen side-by-side in the Verizon commercials, as shown in Figure 6 below ("Battle of the coverage" 2009).

Figure 6: Screenshot from Verizon 3G "There's a map for that" ad showing coverage maps of Verizon and AT&T. Source: Flowing Data[29]

Following this shameful exposure, AT&T ran to the Courts to complain and filed two lawsuits in federal court alleging that Verizon's ads, although true, were misleading. In the ad, Verizon's 3G coverage map shows almost full coverage around the country depicted by red shading, whereas for AT&T, the map shows very little 3G coverage depicted by blue shading. AT&T alleged that although the maps compare 3G coverage of

[28] 3rd Generation Mobile Telecommunications.
[29] Retrieved from http://flowingdata.com/2009/11/24/verizon-vs-att-battle-of-the-coverage-maps/

the two providers, the implication is that AT&T has no coverage at all in most of the United States, when AT&T simply does not have 3G coverage in those areas that are not marked in blue. In court, AT&T found no redress.

Next, AT&T decided to fight back in the same game – advertising – instead of complaining and trying to strike a legal victory; AT&T hired actor Luke Wilson to "set the record straight" by some creative advertising. In the ads, Luke clarifies alleged misunderstandings created by the Verizon ads, and gets one step ahead by showing a comparison chart matching apples to apples to give AT&T one leg up. This, playing in the same game instead of being a tattletale, was sportsmanlike conduct.

So then, Verizon quickly assumed the defensive position and slapped AT&T with an "our ads are true, and the truth hurts" comment in response to AT&T's unsuccessful legal claims followed by the ads featuring Luke. This comment only goes to show that AT&T's advertising response indeed hurt Verizon's hard-earned glory by way of the allegedly misleading 3G coverage maps, that AT&T's truth hurt them right back as theirs had did AT&T. Maybe Verizon could have come back with an even better ad to earn more respect.

7. HOOTERS, INC.

The inspiration for this paper came from the Hooters example. Six Florida businessmen opened the first Hooters restaurant on April 1, 1983, as an April Fool's joke. They did not believe that their prospect would launch to such heights of popularity. Fast forward almost 30 years, and Hooters is a big name in quick service restaurants, serving spicy wings with some pretty hot service.

It is well known that Hooters has been subjected to many legal claims. Around 1997, men in Chicago and Maryland received settlements ranging from $10,000 to

$20,000 because they were refused employment at Hooters and filed discrimination lawsuits as a result; as part of that same settlement, Hooters agreed to create support jobs for men which included bartending and hosting, all the while continuing to reserve the wait-staff positions for their famous Hooters Girls. In 2001, they got in trouble for unsolicited advertising. In 2004, they promised to further investigate the much-publicized scandal that job applicants in their California restaurant were secretly being filmed while undressing. In 2009, they entered into a confidential settlement with a Texas man who filed suit against them for being refused a job as a waiter. Also in 2009, an Asian ex-Hooters flight attendant complained to the EEOC about Hooters' policy of only promoting Caucasian employees, and the EEOC, in turn, filed suit on her behalf. In 2010, a female employee alleged in a lawsuit that she was criticized for her weight during a performance review, and that she was offered a gym membership to improve her size, or else… ("Would-be Hooters guy"). This is just a sampling.

Many other Hooters controversies were swept under the radar, were settled confidentially, or fines were quickly paid to sort the matter. But pertaining to one specific complaint, Hooters decided to respond creatively.

In 1991, the EEOC filed a sex-discrimination charge against Hooters for their refusal to hire men as waiters, bartenders, or hosts. Following four years of investigation, the EEOC issued lengthy guidelines for Hooters to hire male employees in their restaurants. Hooters turned to marketing to seek refuge, responding with a robust advertising campaign. Hooters, along with its strong following of loyal customers, marched into Washington, D.C., with hundreds of thousands of written protests questioning the investigation and the findings. The most striking feature of this campaign was the Hooters Guy, a Hooters restaurant manager, who was admittedly scruffy-looking,

and exemplified for the least-suspecting what a Hooters guy would look like, as pictured below with the cautionary tagline 'GET A GRIP':

Figure 7: Vince Gigliotti, a Hooters manager, and the face of the 'Get a Grip' Campaign. Source: USA Today [30]

The Hooters guy made media appearances and was pictured on billboards and trinkets, including Frisbees. This campaign was directed towards the suits in Washington, D.C., with the ultimate goal of poking fun at the unrealistic expectations and demands from the rule-makers. Controversy strangely appears to be part of Hooters' business strategy, and this time again, it worked. Business was better than ever; they won public support, and eventually, the EEOC gave way to Hooters' business strategy (PR Newswire). A marketing victory, and a legal defeat!

8. APPLE

Apple apparently plays by the philosophy: do not sweat the small stuff; settle, and settle again, but keep trotting on. Just about every i-product it has introduced has faced a

[30] Retrieved from http://www.usatoday.com/travel/gallery/hooters/contenttemplate4.htm

trademark infringement lawsuit. According to the law[31], companies can claim a trademark protection in one of two ways: first, if they have been the first to file in the United States Patent & Trademark Office (USPTO); second, if they have a common law protection because of first use. Here is a survey of Apple's "settle and move on" strategy…

In the first decade of Apple's existence, it faced a trademark infringement lawsuit from the world-famous band, the Beetles (their holding-company Apple Corps, and the owner of their record-label, Apple records) that led to a settlement on the terms that Apple will not enter into the music business. Fast forward to just the last decade, Apple was sued for a breach of that settlement contract for using the Apple logo in the creation and operation of the iTunes Music store. Apple computer won in trial court, but Apple Corps decided to appeal. In 2007, they settled, allowing Apple computer (now Apple, Inc.) all the trademarks related to "Apple" (Apple 2007). Speculation is that Apple, Inc., paid a huge sum of money to earn this right, but given its financial successes, it was most likely no more than a small dent in its profits.

In 2007, Apple settled its trademark battle over the iPhone mark with Cisco. The details of this confidential settlement continue to remain undisclosed. Earlier this year, an Arizona voice over Internet (VoIP) provider, iCloud Communications, sued Apple in Federal Court, claiming that Apple intends to sell products that are closely related to those offered by them ever since 2005 under the iCloud mark (Keizer 2011). Apple is anticipated to settle this case as well.

Apple and Nokia have been in a legal tussle since 2009. Allegedly, Apple infringed upon close to two-dozen Nokia patents for mobile technologies (Allison 2011).

[31] Generally speaking.

Apple counter-sued for computer-related patents. After a tug-of-war of legal arguments, Apple settled the suit with Nokia agreeing to pay them a lump sum of cash and royalties.

Figure 8: Apple and Nokia settle their patent claims. Source: The Mac Observer[32]

Recently, Apple has been slammed with a trademark infringement suit over the term iBooks. On June 15, 2011, Apple was sued for the infringement by New York publisher John T. Colby (*J. T. Colby & Co. v. Apple, Inc.*). Colby had bought assets of various entities of another New York publisher who had published over a thousand books under the 'ibooks' mark beginning over a decade ago (Dolmetsch 2011). Apple's iBook is an electronic library that can be accessed on its iPad or the iPhone, and Colby claims that this use will make Colby's mark worthless. History dictates that this too will be settled.

But none of this seems to derail Apple, Inc., from its success formula: create stylish products, charge a premium price, offer great service, "think different" when it

[32] Retrieved from http://www.macobserver.com/tmo/article/apple_settles_iphone_patent_lawsuit_with_nokia/

comes to marketing, and pay-off whatever comes in between. The customers do not seem to be aware of or be disillusioned by Apple's legal dilemmas. As for the lawsuits, it is in Apple's best interest to settle quietly, and save that Apple brand and the 'i'-brands for its customers who will undoubtedly fill Apple's pockets many times over to compensate for its monetary settlement losses.

9. SOUTHWEST AIRLINES

Southwest Airlines (SWA) exemplifies a lesson learned quickly. SWA decided to create a brand around the idea of sex appeal; it decided to only hire females for their front line, customer-facing jobs. It had a streak of 'sexy' ads, featuring pretty flight attendants, dressed in provocative clothing.

Figure 9: Screenshot from Southwest Airlines Ad in the 1970s. Source: Upgrade: Travel Better Blog[33]

[33] Retrieved from http://www.upgradetravelbetter.com/2007/09/16/when-is-an-airline-apology-not-an-apology-when-its-from-southwest/

Like Hooters, men were reserved for the behind the scenes jobs. (*Wilson v. Southwest Airlines Co*., 1981). Consequently, the airline became popular among the men, but not so much with women (maybe because they were losing their husbands and boyfriends to extra trips out of town, or maybe because they felt degraded). Males seeking employment were unhappy because they were turned down from frontline jobs reserved for the apparently sexier sex. The men who were discriminated against filed suit, and SWA decided to defend the claim.

One defense available to marketers when they discriminate is the Bona Fide Occupational Qualification (BFOQ) defense (*Smallwood v. United Airlines, Inc*., 1981: BFOQ cannot be justified by mere cost savings; *Intl. Union, UAW v. Johnson Controls*, 1991: BFOQ cannot be based upon paternalistic motives; *Olsen v. Marriott International, Inc*., 1999: BFOQ cannot be based solely upon customer preference; *Hernandez v. Univ. of St. Thomas*, 1992: BFOQ must respect privacy concerns). The BFOQ defense wins the day when the employer's business is such that they have to discriminate (*Diaz v. Pan American Airways, Inc.,* 1971: BFOQ must relate to the essence of the business operation). Race can never be a BFOQ (*Ferrill v. Parker Group*, 1990). Other things may be, depending upon the facts of the case.

SWA claimed that having sexy female flight attendants was a BFOQ because it was linked to their brand image. The BFOQ defense did not hold up for the facts of the SWA case. That defense was struck down, because let's face it, SWA is in the business of air travel, not sex in air travel.

SWA gave up a controversial strategy and have, since then, continued to be a successful airline, earning from both males and females alike. Smooth move for survival.

A while back, Hooters started its own airlines. The flight attendants were the infamous Hooters Girls who had now become an indispensible part of the Hooters brand.

The airline did not survive. And it may be because Hooters was so married to its already existing image that it opted to loose its business venture rather alter its branding strategy.

10. BP COMES BACK AFTER LEAK

On April 20, 2010, there was an accidental oil spill in the Gulf of Mexico. The spill was caused by gushing oil resulting from the explosion of Deepwater Horizon drilling on British Petroleum's Macondo Prospect. The spill was not capped for almost three months, and after it had released 4.9 million barrels of crude oil into the Gulf. There was large-scale damage to human and marine life, wildlife habitats, and to the fishing and tourism industries.

Figure 10: BP Deepwater Horizon oil rig ablaze. Source: Treehugger[34]

[34] Retrieved from http://www.treehugger.com/files/2010/05/bp-gulf-oil-spill-timeline.php

There is no escaping responsibility for a disaster of this caliber. BP had only one way out, which was taking full responsibility. The U.S. Government found BP responsible. BP immediately came forward among the press and media personnel and accepted full responsibility for the accident, and made a public apology (made by Tony Hayward, then CEO) worth $20 billion. But for a crisis of this scale, the recovery does not stop there. Simply paying the victims will not make them whole and get BP its reputation back; rather, this will be a long and tedious process. Not to mention, BP also faces litigation that can be dragged on for years, requiring BP to pull through the years with a parallel brand building strategy that counters its tarnishing reputation in Court.

What helps BP, however, is their hefty financials that will allow them to pay up in order to earn that goodwill back, for as long as it takes to earn that goodwill back. It is a financial hit no doubt, but not so much for this resourceful giant. They now have to truly go "Beyond Petroleum" (as they once claimed in their ad campaign) and restore faith in their brand; and they are taking steps in the right direction.

On October 1, 2010, Robert Dudley, a diplomatic businessman, came on as the chief executive officer (CEO) to help repair BP's image. Among other things, BP is funding tourism promotions (Koenig). And a year after the spill, it is still paying out. This will be a long recovery indeed, but BP is definitely headed towards recovery.

Chapter 4: Discussion

This final chapter will first review the purpose of this paper, then underline the overall themes derived from this exercise, and follow that up with a generalized list of specific lessons learned in the process. Finally, the paper will propose avenues for future research in or around the area investigated in this report and present a conclusion.

The goal of this paper was to investigate brands and their marketing strategies in times of legal conflict. The cases selected were among top brands in the United States, the United Kingdom, or global brands. Each had a different plan of action, evidently formulated by a different mix of in-house counsel and brand spokespersons. The different plans of action can also be attributed to the varying brand images of the products in question, the severity of harm or potential harm caused to society (or any particular faction thereof), the level of fault or culpability that can be assigned to the marketer (or, the amount of evidence that ties the marketer to the alleged problematic message), and the pronouncement of the ultimate jury in the court of public opinion. Ultimately, all these factors contribute to the reasonableness measure, a standard held determinative in the area of legal practice[35].

Before any indulgence into lessons learned from individual cases, it must be noted that there were some overall themes that emerge from this endeavor. Foremost, and most potent, of these messages is that controversy can be good for business in a multitude of ways. Among other things, it helps stir up things for a brand when it appears that the brand has been stagnant for a while; it creates a buzz; it brings out the strongest voices on

[35] In a civil court, a defendant is found liable if it is more reasonable than not that the defendant committed the alleged wrong. Conversely, in a criminal court, a defendant is convicted if found guilty beyond a reasonable doubt.

both sides of the issue; it makes headlines, the news, talk-shows; the rebels emerge and embrace the brand; and, it challenges the brand managers to be the best brand ambassadors and perform their best when thinking of responses to public attacks. Having responded, the marketers can simply sit back and let the tide pass without diving into the mess again for some time. People will eventually forget; the human brain is slammed with messages everyday, and with new controversies sprouting up all around, and as a result of the clutter created by infinite messages, it is likely that the previously controversial issue will soon become a thing of the past (unless, of course, you are BP).

Another recurring theme in the cases investigated was that when companies do not want to give up their tactics, they simply buy out those who point a finger at them to raise an objection. Although, when companies choose to settle, they inevitably admit to the public that their practices would not hold muster in court; but hey, that too is what makes them controversial.

Finally, it must be said that creativity is limitless. Some brands appear to cross the line between creativity and legality, yet they do it masterfully, and most likely, have a Plan B in place to counter-attack when challenged.

WHEN WALKING THE LINE, MARKETERS BEST USE CAUTION

Apart from the overall themes, there are lessons to be learned from each brand observed in this paper. These lessons are summarized in Table 1, and discussed below:

Phillip Morris

Phillip Morris indulged in promoting a cause that runs directly against the very purpose of their existence; they attempted to teach a “no smoking” lesson to young people who once were their target audience. This they were required to do, and they did so, pretentiously. The public saw right through their limited budget and ads that tended to

have a counter effect. When kids are told what to do, as they were told in the Phillip Morris ads, they will rebel against what is it, and do the exact opposite. Phillip Morris knew that; their cigarette marketing is often edgy, excessively financed, and based on solid research. Their efforts to "discourage" young folks to smoke appeared pretentious and hypocritical especially because in a few years, when those pre-teens come of age, Phillip Morris will market their brands to them directly.

Lesson learned: Companies should not advertise in a pretentious manner, even though they are doing something they are legally obligated to do, because the public will see right through the shallowness of their tactics, and that will taint the marketer's brand.

Sisley

This Benetton brand's strategy was denial. An edgy ad with the same look and feel and controversial tones as its other ads hit the marketplace, and after the ad had been out for a while and complaints came pouring, Sisley decided to brush it off stating that it had nothing to do with this ad. That may indeed be true, but the jury is still out and enough time has passed for the issue to simply pass by. Sisley waited a while to respond, and this delay raised much doubt among the public: if Sisley was clean of this act, it should have come forth with the denial much sooner. Instead, Sisley arguably wanted the ad to stay in the market long enough for the ad to cause the stir it so desired. Later, a simple denial pulled them out of legal trouble. And, it survived in the court of public opinion because there was not enough evidence tying it to ad, apart from its reputation for notoriously edgy ads.

Lesson learned: If a company's brand is edgy, and there is an edgy ad attributed to that company that gives them negative press, they can simply deny the allegations if there

is no substantive proof pointing towards them. All the while, they can rejoice in the bliss of the buzz generated as a result of the ad.

Chase, too, benefited from this deal. It got publicity, yet people thought of Chase as the innocent party dragged into the mix without choice. Maybe Chase did participate, maybe it did not participate; but it quietly sat back and let the controversy play its course.

Lesson learned: When a marketer is deemed an innocent third party in a controversial scenario that gives it publicity, their best bet is to sit back, and enjoy the fame, and resist commenting.

Janet Jackson

That halftime show was quite memorable! Janet laid low for sometime after that incident, although her wardrobe malfunction moment was played many times over on TiVo. Her strategy was simple… show your nipple, then apologize. That apology took her a long way professionally. People tend to forgive, and over time, forget (even if they are not able to forgive). CBS used another strategy; they brushed off all responsibility, and they too survived.

Lesson learned: If there are multiple parties involved, those that did not personally do the act in question, and are only vicariously deemed liable, can stand back and point fingers towards the ones who were personally involved. If a brand (personality) is directly involved, clearly culpable, and the harm caused is not of too great a deal (monetarily speaking), then a simple apology can go a long way.

Abercrombie & Fitch

Racial discrimination does not stand a chance. Courts will look into it with strict scrutiny. So the only option for A&F was to give up that strategy, even if they were being hypocritical in doing so, because that is what the law required. A&F took steps in the

right direction to correct their employment and marketing strategies, and then waited till they moved out of the spotlight to slowly regress to their old ways in a subtle manner.

Lesson learned: There are some forms of discrimination that will never be reasonable in the court systems and in public opinion. The best practice is to resolve that practice to embrace the global diversity and find edge in other ways. When the discrimination brings a marketer to public light, it is a good idea to sit tight for some time to let the controversy pass.

Calvin Klein

Sex appeal in advertising raises brows. But child pornography raises arms (in protest). Despite constant reminders to lay off child-models, or the Kate-Moss-kind-child-like models, Klein keeps pushing back with a new twist on the same strategy. Society loves its children, and if Klein continues to mess with them, he will eventually tarnish his brand. He needs to learn his lesson the first time, or the second time, or the third time… Now would be a good time.

Lesson learned: Society likes its children, and likes to keep them protected. It is unreasonable for a brand to continue to play with society's sensitivities over and over again. Once a company has been put to notice about an issue that does not pass muster in the market, the company ought to take the heed and find another, more acceptable controversial strategy. If not, the company's brand will lose public support.

AT&T

AT&T went crying to mommy (the court) about Verizon's creative attack. Mommy said, go back and deal with your problems amongst yourselves. Then, AT&T decided to take eyeball for eyeball, and defeated Verizon at its own game, pushing Verizon into the corner, and forcing it to complain. Keeping the game on the field was

probably a great decision for AT&T, and doing so pushed it towards creativity and possibly a larger share of the market.

Lesson learned: When the game is advertising, marketers should play by the rules and respond creatively in the same game, leaving the verdict to the jury in the court of public opinion. When a company goes to battle with a competitor, they need to protect their fort by filling gaps in their own campaign so they do not get counter attacked.

Hooters

Controversy is 'the' strategy here. Also, they have creative geniuses on board. They did what no marketer had done before… they took a legal challenge, and won it outside the courthouse, quite literally. Never before had the lawmakers responded to a billboard by repealing their argument. The power of creative advertising was at its best in the Hooters example.

Lesson learned: when controversy is working for a brand, the controversy is not hurting an absolutely protected class of people, and the brand is supported by its loyal following, the brand should stick to its strategy.

Apple

Apple benefited from unregistered trademarks, and even from trademarks owned by other brands. Their strategy: stay true to the brand promise, deliver modern-looking products with the great marketing that comes along with it, and do not sweat the small stuff. The small stuff here are the trademark infringements, which are small simply because Apple is big (financially speaking), and it can drop the cash to settle over and over again. And so it does. But the brand keeps marching on!

Lesson learned: If a company has made it big, and made big bucks, it can infringe and drop cash at every attack to quiet the noise.

Southwest Airlines

They gave up their strategy. Discrimination based on sex is easier to get away with when compared to racial discrimination; nonetheless, it is still discrimination that alienates a huge segment of the market. That is never good for the brand that is here to stay. They had a popular airline, and maybe their discriminatory strategy hiked up their brand recognition for a while; but if they wanted to survive in the airline travel industry, they had to give up what truly was not a BFOQ, in order to save their business. Upon survival, they embraced another marketing strategy, which brands ought to be able to do if they have a good product and creative people. Doing just that has made SWA one of the most popular and most profitable airlines in the country.

Lesson learned: When a brand's audience is the general market, and a strategy would alienate one faction of that market, the marketer should reject that strategy to embrace a more wholesome message.

BP

There is no option other than taking responsibility for your actions when a company causes a disaster of the scale that BP did. When you are BP-size, paying the billions that could make a victim whole is the right way; rather, it is the only way to go. There is no hiding behind the storm in this case. BP had long maintained a brand that goes "Beyond Petroleum" when this disaster clouded all their efforts at environmental protection. But to survive, they made the right move by owning up, paying up, and now, they best continue fighting back that ruined image. This will be a slow drawn-out process. And that is just how long it will take for them to clean the mess and attempt to make injured parties whole, knowing that some damage cannot be undone. Lives and livelihoods were lost, and public distrust was paramount. But it is predicted that BP will survive because it is taking responsibility and cleaning up.

Lesson learned: When a company a clearly culpable and causes harm of such great measure that it would be unreasonable to escape from it, it should take full responsibility for its actions and pay the price to repair the damage it caused.

Brand	**Lesson**
Phillip Morris	Do not be pretentious in marketing the brand, even where it is required by law.
Sisley	Where there is no substantive proof connecting the alleged player to the harm: Deny it!
Janet Jackson	Where the harm is not monetary and not extensive: Apologize!
Abercrombie & Fitch	Let go racially discriminatory strategies; if the controversy has shed bad light, lay low until it passes.
Calvin Klein	Do not mess with the society's children; when caught playing with society's sensitivities, learn your lesson the first time!
AT&T	When attacked in the game of advertising, leave the verdict to the court of public opinion: It's eyeball for eyeball!
Hooters	When controversy is *the* strategy for the brand, do not shy away from it as long as the harm caused is not so reprehensible that society shuns the brand: Earn a legal victory by creativity outside the courtroom!

Apple	If the company is making big bucks, and the audience is coming along for the ride: settle, settle, and settle some more when attacked; but tread on with the strategy.
Southwest Airlines	When the audience is the general market, do not alienate a faction of it: Listen, and give up that strategy that's hurting the business and embrace another creative edge!
BP	Where the harm done is enormous, and there is clear culpability: Own up, and pay up!

Table 1: Summary of Lessons Learned from Brands Investigated.

WHERE TO FROM HERE

As discussed earlier, very little has been said about creative responses to legal challenges from a marketer's perspective. This paper indicates that there are indeed a variety of creative ways in which marketers can respond to legal challenges. However, this paper bases its inferences on an observation of the marketplace, which is in constant flux and commonly infiltrated by other influences. Future research could substantiate the findings of this paper in a controlled experiment that compares controversy to image and profits, keeping all other things constant as much as possible.

CONCLUSION

The playing field in creative business is as limitless as the human mind. But just as the human mind needs inspiration and challenge to reach its potential, so too do the ambassadors of creative marketing. As illustrated in the cases above, sometimes a marketer's best strategy emerges in times of legal (or potentially legal) crises. These

strategies heighten the profit potential, raise the bar on brand management, and keep the keep the audience ever so excited! And, where legal crises challenge the marketers, an eager audience inspires them.

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Vita

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